

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

COURIER-JOURNAL, A DIVISION OF
GANNETT KENTUCKY LIMITED PARTNERSHIP ^{1/}

Employer

and

Case 9-RC-17754

GRAPHIC COMMUNICATIONS CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS ^{2/}

Petitioner

SUPPLEMENTAL DECISION
AND
ORDER

I. INTRODUCTION

Pursuant to the Board's Order dated August 27, 2005, remanding this case for further consideration in light of the Board's decision in *St. Joseph's News-Press*, 345 NLRB No. 31 (2005), (*St. Joseph's*), I issue this Supplemental Decision and Order in the above matter.

The issue presented in the Decision and Direction of Election (Decision) in the instant case was whether the newspaper carriers sought to be represented by the Petitioner are independent contractors or employees within the meaning of Section 2(3) of the Act. The Decision found that they were employees. Because there is no shorthand formula for resolving this type of issue, the initial Decision relied heavily upon the Administrative Law Judge analysis of the same issue in *St. Joseph's* - a case described in the Decision as having only minor factual differences from those in the instant matter. ^{3/} Subsequent to the issuance of the Decision,

^{1/} The name of the Employer appears as amended at the hearing held in this matter.

^{2/} In the Decision and issued in this case the Petitioner appeared as "Graphic Communications International Union, Local 619-M, AFL-CIO, CLC." The parties stipulated that since that time the Petitioner has merged with the International Brotherhood of Teamsters and its current moniker is reflected herein.

^{3/} The Decision specifically noted, however, that the Administrative Law Judge's decision had not been reviewed by the Board and was not binding precedent.

however, a majority of the Board reversed the Administrative Law Judge and found that the newspaper carriers in *St. Joseph's* were independent contractors.

Having reviewed the facts of the instant case and the supplemental briefs filed by the parties, and considering the guidance provided by the Board in *St. Joseph's*, I now conclude, for the reasons set forth below, that the individuals sought to be represented by the Petitioner here are independent contractors rather than employees within the meaning of the Act. Consequently, I am dismissing the petition.

II. PROCEDURAL BACKGROUND

On February 14, 2003, the Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of certain newspaper carriers employed by the Employer in Bullitt County Kentucky - a part of the Louisville, Kentucky metropolitan area. The Employer contended that the petition should have been dismissed because its newspaper carriers are independent contractors and not statutory employees within the meaning of Section 2(3) of the Act. A hearing on this issue was held on February 25, 2003 and the Decision and was issued on April 1, 2003, finding that the newspaper carriers were statutory employees rather than independent contractors and directed an election among those individuals. On May 1, 2003, an election was held in the matter with the ballots being impounded. On May 2, 2003, the Board granted the Employer's request for review of the Decision. On August 27, 2005, the Board issued a Decision and Order in *St. Joseph's*, finding that the employer's newspaper carriers and haulers were independent contractors rather than statutory employees. On the same date, the Board issued an Order Remanding the instant case for further consideration in light of *St. Joseph's*, including reopening the record, if necessary, and issuance of a supplemental decision. On November 10 and 11, 2005, the Employer and Petitioner, respectively, entered into and submitted a Stipulation and Motion to Regional Director, stipulating that the facts relevant to the issue of the status of the newspaper carriers remain the same as they existed at the time of the hearing in this matter and that the transcript of the proceeding adequately sets forth the facts necessary to resolve the issue of whether they are employees or independent contractor's, taking into consideration the Board's post-hearing decision in *St. Joseph's*. The stipulation also included an agreement that neither party desired further hearing in this matter. On November 15, 2005, the Regional Director approved the parties' stipulation and provided for the filing of supplemental briefs.

III. THE BOARD'S DECISION IN *ST. JOSEPH'S NEWS-PRESS*

In *St. Joseph's*, the employer published a daily newspaper in Saint Joseph, Missouri. Haulers picked up the bundled papers at the plant and brought them to common drop points, where carriers picked them up. Carriers delivered the papers to *St. Joseph's* customers. They also placed papers in newspaper racks, delivered to dealers, and dropped newspapers at a post office to be mailed to subscribers.

The Board in *St. Joseph's* held that the common law of agency was the appropriate test to determine the distinction between an employee and an independent contractor under Section 2(3) of the Act. The Board rejected the contention of the employer in *St. Joseph's* that the right-of-

control test subsumed all other factors under the common-law agency test, as well as the argument of the union that the common-law agency test should include an analysis of the economic leverage that newspaper carriers bring to the employment relationship in determining whether the Act's purposes would be served by finding independent contractor status. Using its decisions in *Roadway Package System*, 326 NLRB 842 (1998) (*Roadway*), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998) (*Dial-A-Mattress*), as guidelines, the Board applied the common-law agency test to the employer's newspaper carriers and found that, on balance, the factors weighed in favor of finding independent contractor status.

Section 220(2) of the Restatement (Second) of Agency sets forth a non-exhaustive list of ten factors to consider under the common-law agency test relevant to the employee/independent contractor inquiry:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in the business.^{4/}

In *St. Joseph's*, the Board made clear that it adhered to the principle that "all the incidents of the relationship must be assessed and weighed with no one factor being decisive."^{5/}

In *St. Joseph's*, the Board found that the following factors weighed in favor of finding independent contractor status for the newspaper carriers: the employer did not exercise substantial control over how the carriers performed their jobs; the employer was not involved in the ownership or maintenance of the carrier's vehicles; the carriers' method of compensation allowed for a degree of entrepreneurial control; carriers performed their duties without the supervision of the employer; and the employer and its carriers believed they were creating an independent contractor relationship. The Board found that the following factors weighed in favor of finding employee status for the newspaper carriers: the carriers' work was an integral part of the employer's business; the carriers did not perform particularly skilled work; carriers were hired for an indefinite length of time; and the carriers' work was similar to the work of other of the employer's employees. Concerning the last factor, the Board noted that although the employer hired some employees to deliver newspapers, which is the same task the carriers performed, the employees only delivered newspapers to customers who failed to receive normal

^{4/} See, *Roadway*, 326 NLRB at 849, fn. 32.

^{5/} 345 NLRB at slip op 4, citing *NLRB v. United Insurance Co. of America*, 390 US 254, 258 (1968).

delivery. Therefore, the Board concluded that the employees did similar work, not the same work, as the employer's carriers. On the record as a whole, the Board found the factors in favor of independent contractor status outweighed the factors supporting employee status.

IV. SUPPLEMENTAL ANALYSIS

In reaching my determination that the precedent of the *St. Joseph's* case indicates that the carriers in the instant matter are independent contractors, I will first compare the facts of this case with those that the Board indicated lead it to conclude that the carriers in *St. Joseph's* were not employees. I will then explore whether the factors which the Board indicated militated towards a different conclusion in *St. Joseph's* are any stronger or weaker in the instant case. Finally, I will comment on the differences in the cases.

A. A Comparison with the *St. Joseph's* Facts Relied Upon by the Board in Finding Independent Contractor Status:

1. Exercise of Control:

(a) *St. Joseph's*:

In *St. Joseph's*, the Board determined that the carriers' freedom to change the order of delivery, to disregard customers' delivery requests without fear of discipline and to refuse to deliver to customers they deemed unlikely to pay or to whom it would not be economically feasible to deliver demonstrated a lack of control of the employer over the carriers indicating independent contractor status.

The Board noted that the employer in *St. Joseph's* did suggest times for papers to be picked up and set a time by which the newspapers had to be delivered, but indicated that this did not significantly detract from the fact that the carriers enjoyed significant freedom in how they carried out their responsibilities.

(b) *The Instant Case*:

In the instant case, the Employer does not require carriers to pick up their papers by any certain time, but it does require them to have the papers delivered by 6 a.m. on weekdays and Saturdays and by 7 a.m. on Sundays. As in *St. Joseph's*, carriers may make their route deliveries in any manner that they choose and are constrained only by the employer's delivery times – leaving for their own judgment how to make their deliveries in the most timely and cost effective manner possible. They are free to deviate from their regular delivery pattern and take breaks as they wish. As noted in the Petitioner's supplemental brief, there is no indication in the record that, as in *St. Joseph's*, the carriers may decline to deliver to any particular customer on their routes; however, they can determine whether to deliver the paper to a customer's driveway, doorstep, or other location requested by a customer. Additionally, carriers can determine whether to rubber band a paper, deliver it flat, or whether to use a delivery tube. If the carrier or his/her substitute fails to perform deliveries, the Employer will make the deliveries or retain a substitute to do so. Similarly to the situation in *St. Joseph's*, if the Employer has to make a

delivery for a carrier, the carrier is charged the Employer's costs for making the delivery up to the retail price of the newspaper and the failure of the carrier or his or her substitute to perform may be considered a material breach of the contractual agreement. The choice of a substitute belongs to the carrier. Despite the fact that the agreements entered into between the Employer and the carriers require that the carriers provide the Employer with a copy of Department of Motor Vehicle records for any driver used in performance of the delivery agreements with the Employer, according to testimony, in practice the carrier need not disclose the identity of the substitute to the Employer.

Carriers are permitted to deliver other products at the same time that they deliver those of the Employer and at least one carrier delivers a local shopping circular not connected with the Employer while delivering the newspaper. There is no indication in the record that the carriers may decline to deliver to certain customers.

(c) Conclusion:

Although not identical, it appears that the lack of control of the manner and method by which carriers complete their contracted task of delivering papers by a set time is, on balance, very similar in *St. Joseph's* and the instant case.

2. The Employer's Non-Involvement in the Ownership
or Maintenance of the Carriers' Vehicles:

(a) St. Joseph's:

In *St. Joseph's*, while analyzing the common law factor of whether the employer provided the tools necessary to perform the work at issue, the Board observed that in *Roadway*, it had found significant that, although the drivers owned their own trucks, the employer exercised considerable control over the vehicles. The Board noted that, conversely, in both *Dial-A-Mattress* and *St. Joseph's*, the employer was not involved with the drivers'/carriers' ownership or their vehicles. The drivers/carriers in both cases maintained and could use their vehicles for other purposes.

(b) The Instant Case:

In the instant case, it appears that there is no difference from the carriers' responsibilities and obligations with respect to their vehicles and those of the carriers in *St. Joseph's*. While the carriers in the instant case must prove to the Employer that their vehicles carry at least the minimum insurance required under Kentucky law, this appears akin to the requirement in *St. Joseph's* that the carriers indemnify the employer for damages caused by them or their substitute carriers while delivering newspapers.

(c) Conclusion:

There is no apparent distinction between the employers' non-involvement in the ownership or maintenance of carrier vehicles in either *St. Joseph's* or the instant case.

3. The Carriers' Method of Compensation Allows
for a Degree of Entrepreneurial Control:

(a) St. Joseph's:

In *St. Joseph's*, the Board determined that the economic conditions in which the carriers conducted their business was entrepreneurial in nature - allowing them to impact their own compensation - and thus indicative of independent contractor status. In reaching this conclusion the Board observed that "[m]ost importantly the carriers can hire full-time substitutes and hold contracts on multiple routes." ^{6/} The Board noted that the carriers controlled the terms and conditions of employment of their substitutes. The Board also found significant that carriers were permitted to deliver other products, including competing newspapers, while delivering the respondent employer's newspapers. Finally, the Board noted that the carriers' in *St. Joseph's* could solicit new customers, with the help of the employer through its providing free promotional newspapers.

(b) The Instant Case:

In the instant case, carriers are permitted to deliver other products at the same time that they are delivering the Employer's product and at least one carrier regularly does deliver advertisement circulars at the same time as delivering the Employer's product.

Carriers may service more than one home delivery route. Carriers are expected to obtain their own substitutes when they are unavailable to make deliveries. They do not need approval from the Employer regarding the identity of their substitute or substitutes and, in many instances, the Employer is unaware that a substitute is handling a route; this despite the agreement's requirement that the carriers provide the Employer with driver and motor vehicle records for any substitute driver as well as records for any motor vehicle to be used in the delivery of the paper. For example, one carrier appears to routinely utilize her husband to assist her in servicing her routes. The Employer is not involved in any remunerative arrangements between the carrier and his/her substitute.

Although most new subscribers are procured through the Employer's telemarketing efforts, carriers may, on their own sign up new subscribers and receive a bonus in the range of \$2 to \$10. Carriers may also suggest store or rack locations to their district manager as a means of selling more papers, thereby enhancing their earning capacity. With respect to deliveries to stores, carriers divide with the store the amount received what the carriers pay wholesale for papers and the retail cost of the papers without the Employer dictating the terms of the split.

^{6/} Id at slip op 6.

(c) *Conclusion:*

There appear to be only negligible differences between the degree of entrepreneurial control in *St. Joseph's* and the instant case with respect to those factors which the Board viewed as indicating independent contractor status in *St. Joseph's*.

4. Employer Supervision of the Carriers'
Performance of their Duties:

(a) *St. Joseph's:*

In *St. Joseph's* the Board articulated that another common-law agency factor that weighed in favor of finding independent contractor status was the carriers' performance of their duties without the employer's supervision. The Board noted that in *Roadway* it had found that the employer supervised its drivers by means of providing extensive training and logistical support, while in *Dial-A-Mattress* it found significant that the employer did not subject drivers to its work rules. The Board observed that the carriers in *St. Joseph's* were likewise neither subject to discipline nor subject to the employer's employee handbook or other work rules.

(b) *The Instant Case:*

In the instant case the only option the Employer has if there are problems with a carrier's work (other than in a missed delivery situation where, as in *St. Joseph's*, the Employer can itself make the delivery and charge for the cost) is to declare the contract in breach for continual omissions and terminate it. Thus, the progressive disciplinary procedures applicable to the Employer's other employees do not apply to the carriers.

(c) *Conclusion:*

On this point, at least with respect to that aspect given weight by the Board in *St. Joseph's*, the situation in *St. Joseph's* and the instant case appears the same.

5. The Belief of the Employer and its Carriers as to Whether
They Were Creating an Independent Contractor Relationship:

(a) *St. Joseph's:*

The final common law agency factor swaying the Board to determine that the carriers in *St. Joseph's* were independent contractors rather than employees, was the parties belief that they were creating an independent contractor relationship. The evidence for this conclusion was apparently gleaned from the parties' contracts, which emphasized that the carriers would be working as independent contractors.

(b) *The Instant Case:*

Carriers are recruited for open routes through newspaper advertisements seeking “independent contractors.” All three types of agreements entered into by the carriers in issue state that they are between the Employer and an “independent contractor.” Moreover, at least some of the carriers have been told by representatives of the Employer and they are independent contractors.

(c) *Conclusion:*

There is no apparent distinction between *St. Joseph’s* and the instant case on this point.

B. The Factors Noted in *St. Joseph’s* as Militating Towards a Finding of Employee Status:

In *St. Joseph’s* the Board stated that it did not disagree with the Administrative Law Judge's finding that several of the factors in the parties' relationship weighed in favor of employee status. First, the Board acknowledged that the work of the carriers was an integral part of the business of the employer. Like the Employer here, the employer in *St. Joseph’s* was engaged in the publication, distribution, and sale of a newspaper. These carriers carry out the last of these functions. This factor in the instant case, like in *St. Joseph’s* militates in favor of employee status. Second, under the common law, unskilled work weighs in favor of employee status. The work performed by the carriers in both *St. Joseph’s* and the instant case is not particularly skilled. Third, with respect to the length of time that a carrier serves, neither *St. Joseph’s* nor the instant one is a situation where the disputed person is hired for a specific project. The carriers are hired for an indefinite period. This factor militates in favor of employee status. Fourth, the Board noted that the common-law agency looks to whether the principal performs the same work, through its own employees, as the persons at issue. In *St. Joseph’s*, the employer employed several undisputed employees who made deliveries. These deliveries, however, were to customers who failed to receive their normal delivery. Thus, while the work was said by the Board to be “similar” to the carriers', it was found not to be “the same.” It appears that this is also the case in the instant matter. Thus, there is almost no difference between the factors militating towards employee status between the instant case and *St. Joseph’s*.

C. Differences between *St. Joseph’s* and the Instant Case:

Although there are minor differences in the facts of the instant case from those set forth in *St. Joseph’s*, certain of which militate towards a finding of employee status and others non-employee status, most of these seem equivocal. For example, in *St. Joseph’s* the carrier agreement specifically required that the carriers provide the employer with the name of a person who could be called if the carrier was unavailable. No such requirement exists the instant case. However, the carriers here are required by agreement to provide the Employer with information on substitutes within 48 hours of a request and, as noted, are required to provide the Employer

with Department of Motor Vehicles' records for any driver or motor vehicle to be used in performance of the agreement, but this appears to be ignored in practice. Similarly, by way of example, in *St. Joseph's*, the employer posted a list of the sequence in which carriers received their papers for loading at the employer's facility. There is no evidence in the instant case of any established sequence in which the carriers receive their newspapers, but all carriers must pick up their papers in time to meet the Employer's imposed delivery schedule. The employer in *St. Joseph's* also instructed carriers when they were to make "drops" in relation to other duties performed on their route, including when to deliver mailbags of newspapers to post offices. No such delivery instructions have been shown to exist here.

I, therefore, conclude that what differences that do exist between the instant case and *St. Joseph's* are inconsequential and on the whole balance each other out with respect to the status of the carriers.

V. CONCLUSION

I have carefully reviewed the record in this matter and fully considered the briefs and arguments of the parties and I conclude that there is no meaningful distinction between the instant case and *St. Joseph's*. The precedent of *St. Joseph's* provides clear guidance as to the status of the carriers in the instant case – that being that they are independent contractors rather than employees. I will, therefore, dismiss the petition. ^{7/}

VI. ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and it hereby is, dismissed.

VII. RIGHT TO REQUEST REVIEW

Under the Supplemental provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by the

^{7/} The Petitioner notes in its supplemental brief that the Board also remanded a Decision and Direction of Election in *Arizona Republic*, Case 28-RC-6304 in light of the issuance of the *St. Joseph's* decision. The Petitioner further notes the Regional Director of Region 28 issued a Supplemental Decision and Direction of Election adhering to his original determination that the carriers in issue were employees. The facts in *Arizona Republic* are, however, clearly distinguishable from the facts of the case before me. For example, the carriers in *Arizona Republic* received specific route sequences, subscriber information, and subscriber special requests via an electronic computer called a Soft Book. They were required to deliver newspapers according to the Soft Book Sequence and to follow the special requests noted in the soft book. Also of note, in *Arizona Republic* the carriers, unlike the instant case, were subject to a progressive discipline system for problems with newspaper deliveries. Finally, the carriers in *Arizona Republic* were far more closely supervised than the carriers in this case – the *Arizona Republic* carriers being subject to being followed on their routes and overseen with respect to the speed at which they assembled papers, the number of carts used, their dress and a prohibition on traveling with pets.

Board in Washington by 5 p.m., EST on **January 20, 2006**. The request may not be filed by facsimile.

Dated at Cincinnati, Ohio this 6th day of January 2006.

/s/ Laura E. Atkinson, Acting Regional Director

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